NO. 27

IN THE

Supreme Court of The United States

OCTOBER TERM, 1943

GENERAL COMMITTEE OF ADJUSTMENT OF THE BROTHERHOOD OF LOCOMOTIVE ENGINEERS FOR THE PACIFIC LINES OF SOUTHERN PACIFIC COMPANY (an unincorporated association),

Petitioner,

vs.

SOUTHERN PACIFIC COMPANY AND GENERAL GRIEVANCE COMMITTEE OF THE BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN (an unincorporated association),

Respondents.

Brief for General Grievance Committee of the Brotherhood of Locomotive Firemen and Enginemen, Respondent

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OPINION BELOW

The opinion of the Circuit Court of Appeals (R. 792) is reported in 132 F. (2d) 194. There was no opinion of the District Court, but its findings of fact and conclusions of law are found in the record. (R. 44-57)

JURISDICTION

The decree of the Circuit Court of Appeals was entered on November 18, 1942. (R. 827) A petition for a rehearing was filed by respondent Engineers (R. 828) and denied on January 22, 1943, with a modification of the opinion. (R. 828-829) The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U.S.C., Sec. 347).

STATUTE INVOLVED

The statute involved is the Railway Labor Act (Act of May 20, 1926, as amended by the Act of June 21, 1934 (45 U.S.C., Secs. 151-164), the pertinent parts of which are printed in the appendix to the cross-petition filed in the companion case (Docket No. 41) to the present case, Docket No. 27. The entire Act is printed in the appendix to the brief of the United States as *amicus curiae* filed in these two cases, so that a further reprint in this brief seems unnecessary.

STATEMENT OF THE CASE

The case began with the filing of a complaint in the District Court by present petitioner (the Engineers) seeking, through a declaratory judgment, to have the court declare invalid, as violating the Railway Labor Act, certain provisions of a collective bargaining contract between the present respondent (the Firemen) and the respondent railroad, the Southern Pacific Company. (R. 2-13)

The Engineers complained, first, that the Firemen's Brotherhood had made an invalid agreement with the Railroad by which members of the Brotherhood, whether working as engineers or as firemen, were con-

ceded the right to be represented by the Firemen's Brotherhood in the handling of their "grievances"; and, second, that the Firemen's Brotherhood had made certain invalid agreements with the Railroad which had the effect of regulating the employment of engineers.

The Firemen defended the validity of their agreements on the following basis: *First*, that a member of the Firemen's Brotherhood had a right under the Railway Labor Act, and a constitutional right, to be represented in the prosecution of his individual grievance by a representative of his own choosing; and *Second*, that the alleged regulations of engineer employment included within the Firemen's contract were proper and valid conditions imposed on the grant by the Firemen to Engineers of the privilege of having an engineer (forced out of engineer service in a reduction of force) demoted to the position of fireman in the order of his seniority—thereby displacing any fireman who had less seniority.

The District Court sustained the contentions of the Firemen in its findings of fact and conclusions of law (R. 44-57) and entered a decree in accordance with its conclusions, sustaining the validity of all the challenged provisions of the Firemen's contract. (R. 58-59)

The Circuit Court of Appeals sustained the District Court entirely on the so-called representation issue, holding as follows:

> "We hold that so far as concerns an engineer member of the Firemen's Brotherhood, the district court's interpretation of Article 51, Section 1 of the Firemen's Schedule, that the Firemen's Committee may be his representative in the arbitration of his individual grievances under the provisions of the Act, is correct, and affirm its judgment to that effect." (R. 815)

The Engineers petitioned for and were granted the

present writ of certiorari to review this judgment (Docket No. 27).

The Circuit Court of Appeals also affirmed the judgment of the District Court as to the validity of the Firemen's contract imposing conditions upon the exercise by the engineers of the demotion privilege, but with an amendment to the judgment of the District Court construing one provision of the Firemen's contract as partially valid and partially invalid. Thereupon, the Firemen filed a cross-petition for and were granted a writ of certiorari to review this part of the judgment of the Circuit Court of Appeals (Docket No. 41).

The present respondent, in its brief as petitioner in No. 41, has made a full statement of the underlying facts although related particularly to the so-called mileage regulation issue. The petitioner in the present case (No. 27) has made a reasonably accurate (although argumentative) statement, and the Southern Pacific Company, respondent, has made a further statement in its brief filed herein. In view of the simplicity of the issue presented under the present petition, and in view of the fact that both the lower courts have ruled with the Firemen on this issue, it seems unnecessary to burden this Court with any further statement of the case.

THE QUESTION PRESENTED

The question presented in this case is simply this: Is there any provision of the Railway Labor Act which denies to an individual employee of a railroad the right to be represented in the handling of his individual grievance by a representative of his own choosing?

Perhaps it should be explained that a "grievance" is a claim against a railroad made by an individual.

employee who is personally aggrieved by some management action which may consist of (1) denying him proper payment for service performed, or (2) denying him the right to an assignment to which he thinks himself entitled under the rules establishing his seniority, or denying some other right to a particular employment, or (3) imposing on him a discipline which he believes is unjustified, which may vary from charging him with demerits to a suspension or discharge from the service.

SUMMARY OF ARGUMENT

I

The Firemen contend that the right of an individual to prosecute his individual claim for money, or for an opportunity to work, or to set aside unjustified discipline, is an inherent constitutional right and that this right includes the right to select his own representative to prosecute his individual claim. It follows that unless the Railway Labor Act specifically denies this individual right, and can be constitutionally construed to deny such a right, the provision of Article 51, Section 1 of the Firemen's agreement, by which the Railroad concedes this right, must be valid.

II

The Railway Labor Act does not deny but, on the contrary, affirms the right of an individual railway employee to prosecute his grievance through a representative of his own choosing.

III

No provision of the Railway Labor Act could be construed to deny to the individual the right to prosecute his own claim through a representative of his own choosing without violation of the Fifth Amendment.

ARGUMENT

I

A railway employee has an inherent right to prosecute his individual claim through a representative of his own choosing.

The provision of the Firemen's agreement which is challenged by the Engineers reads as follows:

> "ARTICLE 51.
>
> "Adjustment of Differences.
>
> "Sec. 1. The right of any engineer, fireman, hostler or hostler helper to have the regularly constituted committee of his organization represent him in the handling of his grievances, in accordance with the laws of his organization and under the recognized interpretation of the General Committee making the schedule involved, is conceded." (R. 616)

The Engineers contend that the inclusion of the word "engineer" in the above-quoted provision represents an invalid attempt by the Firemen to agree with the Railroad upon the right of the Firemen's Brotherhood to represent an engineer member in the prosecution of a grievance which he may have arising out of his employment as an engineer. The sole apparent basis for this contention is the provision of Section 2, Paragraph Fourth, of the Railway Labor Act, which reads:

> "Fourth. Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this Act."

The plain meaning of the foregoing provision is that the organization selected by the majority of any craft or class of employees is the exclusive representative of that *craft* or class in collective bargaining, or in any action in which the *craft* or class *as a whole* is to be represented. The Act does *not* provide that the majority of any craft or class shall have the right to determine who shall be the representative of each and every employee of the craft or class in the prosecution of his individual rights under a craft agreement.

It has been held by the Supreme Court in *Virginian Railway Company v. System Federation*, 300 U. S., 515, at page 557, that the provisions of the Railway Labor Act "do not require petitioner to enter into any agreement with its employees, and they do not prohibit its entering into such contract of employment as it chooses, with its individual employees."

Under this construction of the Act, it would seem that the Railroad is not required by law to enter into any agreement with the Engineers giving the Engineers an exclusive right to represent all engineers in grievances, and that the Railroad could properly enter into a contract with any organization of employees, conceding the right of the individual members of that organization to be represented by their organization in the prosecution of their grievances.

Section 1 of Article 51 of the Firemen's contract may well be regarded as being only an incidental part of the Firemen's craft agreement—which is for the purpose of fixing the wages and working conditions of firemen. It is additionally an agreement in behalf of individual employees who are members of the Firemen's Brotherhood, conceding to them the exercise of an inherent right to be represented in prosecuting their

individual claims by the organization to which they belong. This organization provides them with insurance and renders many services in addition to acting as a representative in collective bargaining. This construction of the agreement is further stressed in the brief filed herein by the Southern Pacific Company, respondent (p. 25).

In *Illinois Cent. R. Co. v. Moore*, the right of an individual railway employee to sue for damages for wrongful discharge was sustained by the Circuit Court of Appeals; and, although the case was reversed on other grounds, the correctness of this ruling of the Circuit Court was apparently accepted, the lower court having held:

> "The collective agreement as such is made, defended and changed by the union, but *the rights of each employee employed under it are his own, and he may waive or assert them himself as he sees fit.*" (*Illinois Cent. R. Co. v. Moore* (5th C.C.A., 1940), 112 F. (2d) 959, 965; see *Moore v. Illinois Cent. R. Co.*, 312 U. S. 630, 635-636)[1]

The constitutional right of an employee to select his own representative to prosecute his individual claim and to sustain his individual property rights will be discussed under Point III. But the mere statement of the Engineers' claim to a statutory right to represent a litigant against his will should lead one to scrutinize most closely any provision of the Railway Labor Act which, according to the Engineers' contentions, is supposed to render support to the deprivation of an individual right specifically protected by the Constitution of the United States.

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[1] Emphasis throughout this brief is ours unless otherwise indicated.

II

The Railway Labor Act does not deny, but on the contrary affirms, the right of an individual employee to prosecute his grievances through a representative of his own choosing.

Turning now to the Railway Labor Act itself, we find that the specific right of the individual to be represented in the prosecution of grievances by a representative of his own choosing is repeatedly affirmed.

Section 2, Second, reads as follows:

> "Second. All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and *by the employees thereof interested in the dispute.*"

Of course, the Engineers may argue that all the employees of a craft are interested in the enforcement of rights arising under the craft agreement. But it is plain that when an employee sues a railroad to recover wages wrongfully withheld or to rectify the withholding of employment, or to set aside a wrongful discharge, the craft as a whole is not "interested in the dispute" in a legal sense. Even though the craft might wish to intervene in a particular case, the right to prosecute and to settle the individual claim is the right of an individual and he is the person primarily interested in the dispute, who is entitled to select his own representative to represent *him*.

Section 3, First (i) and (j), provide as follows:

> "(i) The disputes between an employee or group of employees and a carrier or carriers growing out

of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on the date of approval of this Act, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

"(j) Parties may be heard either in person, by counsel, or by other representatives, as they may respectively elect, and the several divisions of the Adjustment Board shall give due notice of all hearings to the employee or employees and the carrier or carriers involved in any disputes submitted to them."

In order to understand the full application of the foregoing provisions to the present issue, it should be explained how grievance disputes have been handled for many years on the American railroads, both prior to and since the adoption of the Railway Labor Act. The statute in referring to the "usual manner" of handling such disputes makes it plain that prior practice was to be maintained in continuing the handling of such disputes up to and including the chief operating officer of the carrier designated to handle such disputes.

This prior practice is described in Finding 7 of the District Court (R. 48-50) which is amply supported by testimony of witnesses for the Firemen (R. 204-207, 240-241, 265-268), for the Engineers (R. 140-142, 146-147), and for the Railroad (R. 149-151). It shows a uniform acceptance of the right of the aggrieved employee to select his own representation.

Then the Act provides for an additional method of

final adjustment by setting up an Adjustment Board with four divisions to which unsettled disputes can be appealed. These boards are given the power under the Act to make a final and binding award and, since they are bi-partisan, equally-balanced boards (half the members representing labor organizations and half representing railroad management), provision is made for the selection of a referee to sit with a deadlocked adjustment board and bring about a decision.

It must be evident that since the Act specifically provides that parties to grievance disputes "may be heard either in person, by counsel, or by other representatives, as they may respectively elect," it was understood that in the previous handling of a dispute in the "usual manner," the aggrieved employee would be represented by such a representative as he might select.

The claim of the Engineers that, prior to presentation of a dispute to an adjustment board, the aggrieved employee may be compelled to accept a representation which he does not wish, is not only illogical but would, in fact, prevent the exercise by an aggrieved employee of the right specifically given in the statute to prosecute his case before an adjustment board with the aid of his self-chosen representative. If, for example, a member of the Firemen's Brotherhood were compelled to ask the Engineers' Committee to represent him, in handling his dispute with the Railroad management, the Engineers' Committee might refuse to prosecute his case, claiming that it was not meritorious, or might make a settlement of his case regardless of his wishes, and then he would have no dispute to bring to an adjustment board and no adjustment board would have any jurisdiction to hear him.

Furthermore, it should be understood that the labor members of an adjustment board are designated by

the labor organizations and, as a matter of policy, they have established the practice that cases will not be received except when the appeal to the board is approved by the organization representing the employee.[1] Thus, the claim of the Engineers amounts to this. They would deny to any man working as an engineer, who is not a member of the Engineers' Brotherhood, the right to prosecute any grievance except by the favor of the Engineers' Brotherhood. There are thousands of engineers who have never joined the Engineers' Brotherhood, but remain members of the Firemen's Brotherhood, which is particularly advantageous to junior engineers since they will be likely to render more service as firemen than as engineers for many years.[2] There are a great many engineers who are members of both Brotherhoods. The sole purpose and effect of the contention of the Engineers is to compel anyone working as an engineer to become a member of the Engineers' Brotherhood.

Yet, one of the major protections of the Railway Labor Act is the right of self-organization established for railroad employees in Section 2, stating the general purposes of the Act. These purposes are stated to include: "(2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization; * * * (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering

[1] This is pointed out in the Report of Attorney General's Committee on Administrative Procedure quoted in the Engineers' brief in the lower court.

[2] Between nineteen and twenty thousand Engineers are members of the Firemen's Brotherhood. (R.195)

rates of pay, rules or working conditions."

To carry out these general purposes, Section 2, Paragraphs Third and Fourth prohibit a railroad from exercising any influence in the choice of representatives by employees. The third paragraph reads as follows:

> "Third. Representatives, for the purposes of this Act, shall be designated by the respective parties without interference, influence, or coercion by either party over the designation of representatives by the other; and neither party shall in any way interfere with, influence, or coerce the other in its choice of representatives. Representatives of employees for the purposes of this Act need not be persons in the employ of the carrier, and no carrier shall, by interference, influence, or coercion seek in any manner to prevent the designation by its employees as their representatives of those who or which are not employees of the carrier."

The fourth paragraph provides (following the first two sentences previously quoted) that:

> "* * * No carrier, its officers or agents, shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining, or in performing any work therefor, or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization or to deduct from the wages of employees any dues, fees, assessments, or other contributions payable to labor organizations, or to collect or to assist in the collection of any such dues, fees, assessments, or other contributions: * * *"

It should be apparent that any railroad making an agreement with a labor organization giving that organization an *exclusive* right to represent all employees of one craft in prosecuting their individual grievances would be exerting a powerful influence upon all such employees to join that labor organization and to abstain from joining or remaining a member of another organization which was thereby denied the right to represent its members in prosecuting grievance cases.

When a railroad bargains with the labor organization selected by the majority vote of a craft, and declines to bargain with any organization representing only a minority of the craft, the railroad is simply obeying the mandate of the law. The Congress found it necessary to establish majority rule and to deny to minority organizations the right of collective bargaining because of the practical necessities of the situation. Obviously, there should be only one craft agreement. The making of a multitude of agreements covering the same work would not only make a farce of collective bargaining but would also be destructive of any efficiency in the distribution and handling of work. To sanction collective bargaining by several organizations would be to sanction a contract between the employer and the representative of a minority of the employees which would not be productive of industrial peace and harmony. Accordingly, as a practical necessity, in establishing and preserving collective bargaining in behalf of the employees, it became necessary to establish the right of the representatives chosen by the majority to bargain exclusively in behalf of all the employees of a craft.

But the majority rule is obviously a qualification of the major purpose of the Railway Labor Act, which is to insure to railway employees the right of self-organization and the right to representation by rep-

resentatives of their own choosing. The Act neither recognizes nor grants rights to organizations of employees—except the right of organizations to designate members of the Adjustment Board. All other rights are granted to *employees* and these rights are exercised by organizations, not as organization rights, but as employee rights exercised by *their* representatives. Then the right of the individual to associate with his fellows, to create or to join organizations according to his own free will, is carefully preserved throughout the Act. There is no logical basis for contending that the inherent right of an individual to prosecute his own grievance should be denied in order to create an organization right to coerce employees into joining the organization.

The argument of the Engineers has two phases: First, is the technical claim that one sentence in Section 2, Paragraph Fourth, gives the craft organization an exclusive right to represent all individual employees of any craft because that sentence reads: "The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this Act."

The argument is that "the purposes of this Act" cover everything provided for in the Act, the making and interpretation of agreements, and their enforcement either as a whole or in individual cases. But even if "the purposes of this Act," as a phrase, did include everything covered by the Act, the argument of the Engineers ignores the limitation in the words "shall be the representatives of the *craft* or *class*." This phrase obviously limits the application of the sentence to those matters which concern the craft or class as a whole and where the craft or class is represented and not the individual members thereof prosecuting their individual interests.

In order to evade this counter argument, the Engineers progress their argument into the second phase which is a contention that the craft as a whole is concerned with the enforcement of the craft agreement in individual cases, and that therefore the craft representative must be allowed to control all cases involving the application of a craft agreement. The Engineers cite a number of cases arising under the National Labor Relations Act and a number of commentaries on that Act. Many of the purposes and the provisions of the National Labor Relations Act are very different from those of the Railway Labor Act. But even the position taken by the National Labor Relations Board, extreme as it is in the subordination of individual right to collective interest, does not support the Engineers' argument in the present case.

For example, the Engineers' brief quotes from *Matter of North American Aviation, Inc.*, 44 N.L.R.B., 604, as follows:

> "* * * After a contract has been negotiated and executed, it is continuously modified and supplemented by interpretations and precedents made by employer and employees from day to day in the course of their operations under the contract. This *interpretation* of the contract, no less than its negotiation, constitutes an integral part of the collective bargaining process." (Brief, p. 34)

It can be readily conceded that a formal or definitive *interpretation* of a contract made by the parties thereto becomes a part of the agreement, and that the making of *such an interpretation* is a part of the collective bargaining process. But the right of Engineers to control any such interpretation of a contract which they have negotiated is accepted and preserved in the plain language of the rule in the Firemen's agreement to which the Engineers now object.

Article 51 of the Firemen's agreement, which is the subject of the present controversy, provides specifically for the right of an engineer or fireman to be represented by his own organization, but provides that his grievance is to be handled "*under the recognized interpretation of the general committee making the schedule involved.*" Accordingly, when a Firemen's Committee represents a fireman or an engineer in a grievance arising under the Engineers' schedule, the Firemen's Committee cannot claim or establish any interpretation of the Engineers' schedule contrary to the recognized interpretation of the Engineers' Committee. If there is any doubt as to what is the recognized interpretation, the carrier is free to consult the Engineers' Committee. As a matter of fact, it is the custom throughout the railroads and on the Southern Pacific, as shown in this case, for the Engineers' Committee to be notified of any claim that is advanced under the Engineers' schedule. So the Engineers' Committee has ample opportunity to make sure that the recognized interpretation of the schedule is understood. Under these circumstances, the Firemen's Committee has no power to interpret the Engineers' schedule in any way contrary to the recognized interpretation of the Engineers' Committee.

But, as a horrible example of an evil they are seeking to prevent, the Engineers refer in their brief (p. 39) to a case where it is alleged that the Firemen's Committee, in behalf of an engineer member, compromised his claim by allowing him one half of the amount claimed to be due under the Engineers' schedule, this allowance being specifically made "without prejudice or reference to the provisions of Engineers' agreement."

The Engineers argue that such a practice is not a settlement in accordance with the "recognized inter-

pretation" of the Engineers' schedule—that it undermines enforcement of the schedule and violates the rule that controversies will be handled in accordance with the recognized interpretation. Now as a matter of fact, this claim was handled in accordance with the recognized interpretation and the settlement was made without prejudice to the Engineers' agreement for half the amount apparently due if the "recognized interpretation" had been applied, as contended in behalf of the Engineers.

What was actually done in behalf of the individual engineer represented by the Firemen's Committee was to exercise his individual right to accept less than his full claim, in satisfaction thereof. This was certainly the exercise of an individual right which did not properly concern the Engineers' organization.

The alternative of this settlement might have been a denial of the claim by the Railroad, an appeal to the Adjustment Board, a long delay, and perhaps, in the end, even under the "recognized interpretation" of the contract, the employee might have failed to sustain his claim. The action he took was clearly the exercise of an individual right arising under a contract made for his benefit, and did not involve in any way the assertion or relinquishment of any craft or class right.

If the contention of the Engineers were sustained, the theory of individual rights and individual freedom of labor which underlies American labor law, and the constitutional protections of individual liberty and individual rights of property would lose all force among the wage earners of this country. It is the present prevailing theory that individual workers should be free to join or not to join labor organizations; that they should be free to accept or to decline, or to leave employment at their individual will; that no matter how

the terms of a contract of employment are made, whether individually or collectively through a trade agreement, the individual worker is free to insist upon the enforcement of *his* rights under *his* contract of employment, and is free to prosecute any individual claim against his employer for wages due or for opportunities of employment to which he has become legally entitled, or to defend against discipline unjustly imposed.

It is unnecessary here to stress further the point made in the brief filed herein by the Southern Pacific Company, respondent, arguing that the practical effect of sustaining the Engineers' contention would be to establish a "closed shop" and to make it practically impossible for a railroad employee to obtain or to enjoy the fruits of his employment except by becoming and remaining a member of the craft organization holding the contract covering his line of work. But the point made in the brief of the Southern Pacific Company is sound. The provisions of the Railway Labor Act not only fail to encourage but, in practical effect, deny to any organization the right to establish and to maintain, through contract with a railroad, a closed shop.[4] It is a fact that railway employees are almost universally organized into a limited number of craft organizations, but the strength of such organizations and the solidarity of their membership result from and depend upon the strength of voluntary association, and do not arise out of any coercion imposed on the employees by an organization making a closed shop contract with a railroad.

It does not seem necessary to analyze further the detailed provisions of the Railway Labor Act, especially since such an analysis has been presented in the

[4] The Attorney General agrees that the Act forbids a closed shop contract. Opinions of the Attorney General, Vol. 40, Opinion 59.

present case by the Southern Pacific Company which is properly taking the position of not seeking to favor the interests of any organization of its employees but which is profoundly interested in maintaining the principles of the Railway Labor Act. This Act was written, as has been recognized in previous opinions of the Supreme Court, by the collaboration of railway management and railway labor, and its successful operation for over seventeen years has resulted from the fact that the Act makes extensive provision for the voluntary cooperation of management and labor, with the mediatory aid of government, imposing little compulsion on any party except the obligation to utilize all available methods for the peaceful adjustment of economic controversies. A major strength of the Act has lain in the rights granted and in the protections extended to individual employees and the avoidance of coercion of individual employees by government, by management, or by labor organizations.

We have sought in this brief to avoid mere duplication of arguments ably presented in the brief filed herein in behalf of the Southern Pacific Company, respondent, and in behalf of the United States as *amicus curiae*, which support the validity of the representation provision in Article 51, Section 1, of the Firemen's contract. But it seems proper to emphasize here again that the administrative construction of the Railway Labor Act by the tribunals established for the administration of the Act gives vigorous support to the position of the Firemen.

The National Mediation Board, established in Section 4, is required from time to time to make an authoritative ruling giving its interpretation of the law. On September 21, 1934, the chairman of the Board wrote a letter to the vice president of the Firemen's Brotherhood and the general superintendent of the

Florida East Coast Railroad sustaining the right of the Firemen's Brotherhood to represent its engineer members in the prosecution of their grievances. After reviewing the common practice on the railroads in the handling of grievance cases, regarding which the Board was obviously well informed, the Board reached the following conclusion:

> "In view of this common practice, the Board is of the opinion that in conferences between carriers and employees to consider grievances of employees who have already been disciplined and have carried their cases to higher operating officials, the 'usual manner' of handling such cases has been to permit aggrieved employees to designate representatives for such conferences without regard to whether the representatives were employees of the carrier or not, or whether they were officers of an organization which held a contract or not." (R. 235)

In a letter dated January 4, 1936, addressed to the grand chief engineer of the Engineers' Brotherhood and to the president of the Firemen's Brotherhood, exhaustively reviewing certain jurisdictional disputes between the organizations, the views of the National Mediation Board were set forth by one of its members, Judge Carmalt, in great detail and included the following statements:

> "* * * This Board has ruled that a contract giving exclusive right of representation for grievance cases to any Organization is unlawful under the amended Law." (R. 217)

This letter went on to quote from another letter addressed to the management of the railroad, reading in part as follows:

"The National Mediation Board is compelled to view as a matter of law that the supplemental contract effective October 17, 1928, with the B. of L. E. is absolutely illegal, since the Company interprets it to give to the engineers' committee a right to represent any employee who desires another representation. No contract between a railroad employer and an organization of employees can give to that organization any right to represent an individual employee unless the employee himself assents. The right of an individual to designate the representative of his choice is guaranteed by Section 2, (Second) and the carrier is prohibited by Section 2, (Third) from interfering, influencing, coercing or seeking in any manner to prevent the designation by its employees of their representatives. There is no possible escape from this conclusion as it seems to us, since Section 2, (Eighth) provides that Paragraph Third of the Section is made a part of the contract of employment between the carrier and each employee." (R. 217-218)

On April 14, 1937, the President appointed an Emergency Board, pursuant to the provisions of Section 10 of the Railway Labor Act, to investigate a serious dispute between the four major transportation organizations, Engineers, Firemen, Conductors, and Trainmen, and the Southern Pacific Company. This dispute involved some forty-one items, the first of which arose out of the claim of the Engineers to an exclusive right to represent all engineers in grievance cases. Thus the very question here presented was presented to and decided by the administrative tribunal of highest authority to be created under the Act, and it is worthy of note that the Board was composed of an outstanding lawyer of San Francisco who had been previously attached to the Department of Justice, a Washington lawyer who had previously been a judge, and a college president who has served the government in many

important positions, a thoroughly impartial Board composed of men of outstanding experience and ability. This Board held that the contention of the Engineers in that case, and here repeated, "offends the objects and principles of the Railway Labor Act and infringes upon the rights intended to be secured by that Act," and further held as follows:

> "* * * The whole spirit and intention of the Act is contrary to the use of any coercion or influence against the exercise of an individual's liberty in his choice of representatives in protecting his individual rights secured by law or contract." (R. 736-737)

We submit that the entire discussion by this Emergency Board on the question here presented, which appears in the record on pages 727-743, effectively demonstrates the utter lack of any merit in the Engineers' contentions in the present case when the Railway Labor Act is construed in the light of a practical understanding of the long-established methods and practices of the American railroads in the settlement of grievance disputes with their employees. These disputes, ever since the adoption of the Railway Labor Act, have been uniformly settled through negotiation between the management of the railroad and the organization *selected by the employee* to represent him.

It seems strange that at this late day an attempt should be made to coerce individual employees in the exercise of what are peculiarly their individual rights in the enforcement of their individual claims under contracts made for their benefit. We submit that there is no justification in the Railway Labor Act for the Engineers' contentions. Not only does the Act specifically provide for the protection of individual rights but those rights which would be denied by the Engi-

neers in the present case are fortified by a constitutional protection which the Congress could not disregard and which, we submit, the Congress has shown no intention to disregard.

III

A railway employee could not be constitutionally deprived of the right to prosecute his individual claim through a representative of his own choosing.

It would seem unnecessary to argue at length that an individual has a constitutional right to prosecute his individual claim to money, or to rights of monetary value, through a representative of his own choosing. But in this case, not only do we find counsel for petitioner denying that right but we are also confronted with an opinion of the Attorney General, cited in the brief of the United States (p. 80), in which he has taken the position that the Engineers and the Railroad *could make an agreement* giving to the Engineers the exclusive right to act as representatives of members of the engineers' craft in the handling of grievances. The Government brief takes the position that the Railway Labor Act itself does not grant the exclusive right claimed by the Engineers, but that the Act does not prohibit an agreement with the railroad establishing such an exclusive right.

We must register an emphatic dissent from this opinion, which not only is in conflict with the opinion of the Circuit Court of Appeals in the present case, but is in conflict with a long line of decisions of the Supreme Court.

Apparently the attorneys for the Engineers and the attorneys for the Government agree that a federal

statute could be enacted giving to a craft organization the exclusive right to represent all employees working in that craft (regardless of membership in the organization, and regardless of individual desire) to prosecute individual grievances arising under or out of a craft agreement. Happily, the attorneys for the Government do not agree with the attorneys for the Engineers that the Railway Labor Act has *granted* this exclusive right. But presumably they do agree that the Act does not forbid a contract between the Engineers and the Railroad through which the Railroad could agree with the Engineers to establish such an exclusive right; and both blithely disregard the protections of individual liberty supposed to be afforded by the Fifth and Fourteenth Amendments.

This issue having been raised, we submit that it is of utmost importance for this Court to affirm the constitutional right of the individual to prosecute his individual claim through representatives of his own choosing.

The Fifth Amendment has often been invoked for the protection of insubstantial rights or rights of the individual that must yield to superior rights of government or other individuals. But in the present instance, we submit that the contentions of the Engineers, in part supported by the attorneys for the Government, seek the destruction of an elementary right which has been consistently preserved by the Supreme Court throughout our history.

We are compelled to suggest the desirability of a recurrence to fundamental principles. The Fifth Amendment provides that "no person shall * * * be deprived of life, liberty, or property without due process of law."

It was held in *Holden v. Hardy*, 169 U. S. 366, 389:

"This court has never attempted to define with precision the words 'due process of law,' nor is it necessary to do so in this case. It is sufficient to say that there are certain immutable principles of justice which inhere in the very idea of free government which no member of the Union may disregard, as that no man shall be condemned in his person or property *without due notice and an opportunity of being heard in his defense.* * * *

"* * * Recognizing the difficulty in defining, with exactness, the phrase 'due process of law,' it is certain that these words imply a conformity with natural and inherent principles of justice, and forbid that one man's property, or right to property, shall be taken for the benefit of another, or for the benefit of the state, without compensation; and that no one shall be condemned in his person or property without an opportunity of being heard in his own defense."

In *Powell v. Alabama*, 287 U. S. 45, 68, this Court held:

"What, then, does a hearing include? Historically and in practice, in our own country at least, it has always included the right to the aid of counsel when desired and provided by the party asserting the right. *The right to be heard would be in many cases, of little avail if it did not comprehend the right to be heard by counsel.* Even the intelligent and educated layman has small and sometimes no skill in the science of law. * * *"

It would probably be conceded that in a judicial proceeding a claimant seeking a judgment for money or for the protection or assertion of any valuable right could not be compelled by a constitutional statute to accept the services of a lawyer whom he did not wish to represent him, or denied the services of a lawyer whom he had selected, who was willing to represent

him and who was qualified to act. The same principle which fully sustains the right of a litigant to select his own counsel certainly applies to any administrative proceeding sanctioned or required by statute to adjudicate individual rights. It is questionable whether an individual could be required by statute to accept a representation not of his own choosing or, in the alternative, to prosecute his case by himself (which seems to be one suggestion of the Engineers to mitigate the harshness of their contention) even if the issues were so simple that an individual might not require technical services. But in the present case, there is a need for expert, experienced aid, without which a claimant would be as helpless as a layman in court—and, in fact, would not have even the aid of an impartial judge, anxious to ascertain the facts and to administer justice.

The railway labor contracts are highly technical documents which it is often difficult for lawyers not familiar with railroad work to construe.

In conferences with management officials, resort is had to precedents available only in the files of the organizations and the railroad management. Lengthy and highly technical arguments are held regarding the meaning of contract requirements, and the facts which would be determinative of the claim are often involved in hot dispute. Testimony is gathered and needs proper presentation, statements of facts are prepared, in which the management recital and the employee's recital often differ markedly.

While a grievance dispute is being handled in conference in the "usual manner," it will progress from operating officials of lesser authority up to the chief operating officer of the carrier, who is designated to handle such disputes. As the case moves upward, it must be obvious that the individual employee will be more and more at a disadvantage in handling his own

case. So, all through the conference phase, the employee finds it vital to a proper presentation of his claim to have the aid of the experienced committees and officers of his organization who are trained in this work and trained in meeting and arguing with railroad officials. Then, if the dispute is not settled, it is, under the law, referred by petition of either party, or both, to the appropriate division of the Adjustment Board "with a full statement of the facts and all supporting data bearing upon the disputes." It should be obvious that no individual employee can carry his claim up to an adjustment board in an effective manner, and prepare the record, upon which it will be finally decided, in a manner adequate for a full and fair presentation of his side of the case. The use of labor organization representatives in support of these grievances is just as vital to an opportunity to be heard as the services of a lawyer in a judicial proceeding.

Yet, it is the proposition of the Engineers, which is strangely supported, in part, by the attorneys for the Government, that under a statute of the United States a railway employee can be denied the right to prosecute his own claim through a representative of his own choosing; and that he can be compelled, not merely to accept a representation chosen for him, but he can be compelled to accept a representation which may be hostile to him personally and either unwilling to advance his claim or, at best, indifferent to the success of the prosecution.

The claim of a fireman arising out of his service as an engineer may involve a substantial sum of money. He may have been deprived of a run to which he was entitled and deprived of a large fraction of the earnings to which he was entitled for a considerable period of time. The Engineers' Committee may be frankly hostile to the claim because a member of the Engineers'

Brotherhood may have obtained the run and the earnings to which the member of the Firemen's Brotherhood was entitled. The fireman serving as an engineer may be disciplined for some alleged wrongdoing for which he disavows any responsibility and for which he might claim some other engineer was at fault. Yet, according to the Engineers' contention, he would be compelled to have his appeal from an improper discipline handled by an organization either entirely willing or anxious to have him disciplined.

The shocking injustice resulting from an acceptance of the Engineers' contention has evidently forced their counsel to take the position that a non-member of their organization would not be compelled to accept their representation because he could either prosecute his claim himself or he could bring a suit against the railroad and employ his own attorney.

In the first place, it should be obvious that an employee would be denied a genuine hearing if he were compelled to prosecute his case without technical assistance.

In the second place, the right to sue in court is illusory and commonly a valueless remedy. A great many claims are small in amount and, for even substantial claims, the cost of a lawsuit and the difficulty and embarrassment of carrying on a lawsuit against one's employer would be practically prohibitive.

In the third place, the Railway Labor Act specifically makes it the duty of all officers and employees of railroads to exert every reasonable effort to settle all disputes, including grievance disputes, and provides that they shall be considered and, if possible, decided with all expedition, in conference. Then the Act provides for handling these grievance disputes up to the chief operating officer and then to an adjustment board which has power to make a binding decision. So the

law has laid down a procedure which is practically mandatory even though it does not exclude resort to a lawsuit. The law provides for an administrative process and machinery for settlement of these disputes; and it should be apparent that in such a machinery the elementary requirements of due process of law should be observed just as well as in judicial proceedings. The detailed requirements may be different, and informality of procedure may be permissible. But, if by statute a procedure is provided for the settlement of rights of property, then it should be evident that the fundamentals of due process of law—notice, and opportunity to be heard—must be observed.

In *Nord v. Griffin*, 86 F.(2d) 481, proceedings were carried on before the National Railroad Adjustment Board which resulted in an award in favor of the Brotherhood of Railroad Trainmen and against a railroad company. But, through the enforcement of this award, a switchman, not a member of the Brotherhood, was deprived of the job to which he claimed to be entitled by virtue of his seniority. He brought suit in the United States District Court, seeking an injunction against the enforcement of the award. The injunction was granted and the decree of the District Court appealed to the Circuit Court of Appeals for the Seventh Circuit. The Circuit Court held that the switchman was entitled to seniority rights furnishing him regular employment; that he had been deprived of work paying him $1500.00 a year. It was argued by the railroad that the switchman appellee was (in the language of the court) "bound by an order of an administrative board in a proceeding to which he was not a party, entered at a hearing of which he had no notice." The court held, page 484:

> "* * * The mere statement of the proposition is conclusive of its unsoundness. The rights of plaintiff are protected by the Fifth Amendment."

After citing *Ochoa v. Hernandez y Morales*, 230 U. S. 139, to the effect that due process of law "inhibits the taking of one man's property and giving it to another, contrary to settled usages and modes of procedure, and without notice or an opportunity for a hearing," the court concluded its opinion as follows:

> "Clearly the award, so far as appellee was concerned, was in violation of his rights under the Fifth Amendment to the Constitution, and it was the court's duty, with jurisdiction of the subject-matter and of the parties, to award the injunction. "The decree is affirmed."

Certiorari was denied in *Nord v. Griffin*, 300 U. S. 673.

We may refer again in this connection to *Moore v. Illinois Cent. R. Co.*, 312 U. S. 630. In this case, Moore, a member of the Brotherhood of Railroad Trainmen, brought suit for damages against the railroad, claiming that he had been wrongfully discharged contrary to the terms of the contract between the Trainmen and the railroad. Although Moore lost his suit on the basis of the running of the Mississippi statute of limitations, the question was presented in the Supreme Court as to whether Moore should have first exhausted his remedy under the administrative procedure provided by the Railway Labor Act, since he had not prosecuted his claim to a decision by the National Railroad Adjustment Board. The Supreme Court held that "the legislative history of the Railway Labor Act shows a consistent purpose on the part of Congress to establish and maintain a system for peaceful adjustment and mediation voluntary in its nature." So the Court held that Moore was not required to seek adjustment of his controversy with the railroad as a prerequisite to suit for wrongful discharge.

An employee may not be required as a matter of law to use the administrative machinery of the Railway Labor Act for the adjustment of his grievances; but, to the extent that the machinery is available and has been established by law, he should find himself able to utilize it in accordance with "immutable principles of justice," and without denial of rights which are a part of due process of law. But if the use of the machinery of the Railway Labor Act is wholly voluntary and an employee is under no legal compulsion (although he is under a legal *duty*) to follow the procedure provided in the Act, then certainly there can be no *invalidity* in a contract made in his behalf by an organization of which he is a member, agreeing with the railroad that he can be represented by his own organization in a voluntary negotiation of his claim with railroad officials.

On the other hand, if the legal duty clearly imposed on the employee carries with it some legal compulsion, then the claim of the Engineers that an employee can be compelled to submit his claim to prosecution through a representative not of his own choosing can only be sustained by a flagrant violation of constitutional rights.

Cases Cited By Petitioner

It seems unnecessary to review in detail the citations offered by counsel for petitioner in support of their contentions. The National Labor Relations Board, the Attorney General's Committee, various writers on labor relations, and the judicial opinions cited, provide support only for one proposition, which is not in dispute, which is, that the formal interpretations or other modifications or revisions of a contract are to be regarded as a part of the collective bargaining process.

In the present case, the Firemen have always conceded the right of the Engineers' Brotherhood as the craft's representative to negotiate and enter into a contract determining the wages and working conditions of the craft, and necessarily have conceded the right of the same organization to agree further with the Railroad upon revisions, or supplements, or interpretations which, together with the original contract, eventually represent the craft agreement.

But counsel for petitioner failed to find support anywhere for their present contention that an individual employee can be denied the right to select his own representative for the enforcement of his individual claim arising out of the craft agreement. In their effort to find authoritative support for an insupportable contention, counsel for petitioner proceeded to extraordinary lengths in the misapplication of authorities cited. For example, on page 34 of petitioner's brief, it is stated that enforcement of an order of the National Labor Relations Board was "refused, on different grounds," by the Ninth Circuit Court of Appeals in *N.L.R.B. v. North American Aviation, Inc.*, decided June 24, 1943, now reported in 136 F.(2d) 898. But an examination of the opinion of the court shows that enforcement of the Board's order was denied and the order was set aside on the express ground that the National Labor Relations Act does not grant, but in fact specifically denies any exclusive right to the majority organization to represent an individual employee in the prosecution of his individual grievance.

Then on pages 36-37 of their brief, counsel for petitioner cite the case entitled *National Licorice Co. v. National Labor Relations Board*, 309 U. S. 350, 364, as authority for their claim that this Court upheld an order of the National Labor Relations Board "directing an employer to cease recognizing a minority represen-

tative as the representative of any of the employees for the purpose of dealing with the employer concerning '*grievances*, labor disputes, wages, rates of pay, hours of employment or conditions of work.' " (Italics theirs) But, prior to the quoted passage (which is only a recital and not a holding of the Court), this Court had made the following definite statement:

> "Here the right asserted by the Board is not one arising upon or derived from the contracts between petitioner and its employees. The Board asserts a public right vested in it as a public body, charged in the public interest with the duty of preventing unfair labor practices. * * *"

So this Court held that the individual employees were not necessary parties, and specifically held, regarding the effect of the Board's order, as follows:

> "* * * It does not foreclose the employees from taking any action to secure an adjudication upon the contracts, nor prejudge their rights in the event of such adjudication. * * *"

It should be evident from the above citations that it is not necessary to make a further detailed commentary on the alleged supporting authorities whose opinions are so generously misapplied in petitioner's brief.

QUESTIONS PROPOUNDED BY THIS COURT

In the brief for the present respondent as petitioner in No. 41, we have undertaken to discuss the questions which counsel were requested to discuss by the Court. Since the petition in No. 27 and the cross-petition in No. 41 bring to the Court only one case, we will not repeat here our discussion of the questions propounded by the Court.

CONCLUSION

We submit that the judgment of the Circuit Court sustaining the validity of Article 51, Section 1, of the Firemen's agreement should be affirmed.

Respectfully submitted,

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Note: After this brief was in type, we were served with an addendum to the Government's brief consisting of an "opinion" of the General Counsel for the National Labor Relations Board in which the right to contract for an *exclusive* representation of employees in grievance cases under the Railway Labor Act is defended on the alleged authority of *Atlantic Coast Line R. Co. v. Pope*, C.C.A. 4, 119 F. (2d) 39. This decision does not support the General Counsel's argument and he ignores the following decisions which are directly contrary to his argument:

Illinois Cent. R. Co. v. Moore, 112 F. (2d) 959, 965 (cited *supra* on p. 8).

General Committee etc. v. Southern Pacific Company et al, 132 F. (2d) 194 (the present case).

N.L.R.B. v. North American Aviation, Inc., 136 F. (2d) 898 (cited *supra* on p. 33).

We submit that the opinions of these courts are entitled to greater consideration than the argument of a lawyer which has been specifically rejected by one of these courts.